Nos. 77-1499, 77-1500, 77-1501, 77-1502 and 77-1504

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK P. NORTH, JR., *Petitioner,*

vs.

UNITED STATES OF AMERICA,

JACK E. WALKER, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

PETER V. PAPPAS, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

ROBERT CRAIG, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENT BY PETITIONERS PAPPAS AND CRAIG TO ORIGINAL PETITION FOR A WRIT OF CERTIORARI

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To: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

Petitioner Peter V. Pappas and Petitioner Robert Craig, Defendants-Appellants in the Court below, respectfully sub-

mit this Supplement to their Petition for a Writ of Certiorari and request leave to file the same instanter pursuant to the Rules of this Court.[1]

The Petition for the Writ is still pending before this Court.

Petitioners further submit that the Petitioners have now received for the *first* time, pertinent documents pertaining to their Petition. These documents were not previously relinquished to the Petitioners by Government Attorneys although so mandated by the Trial Court during the pretrial hearings on the Motions to Suppress, and were not available at the time the Petition was filed.[2]

Petitioners first learned of the nature of the Guidelines for "interceptions" of conversations as promulgated by the Attorney General, in February of 1978, *after* En Banc hearing by the Seventh Circuit had been refused. Petitioners immediately filed motions with the Seventh Circuit seeking a hearing before the District Court as to this matter only, to determine whether the Guidelines had been, in fact, complied with. The Government resisted the Motion. The Seventh Circuit denied this relief.[3]

Thereafter, on and after March 7th, 1978, Petitioner Pappas filed written requests for documents under the Freedom of Information Act (hereinafter referred to

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[1] Rule 24 (5) of the Rules of this Court provides that:

"Any party may file a supplemental brief at any time while a Petition for a Writ of Certiorari is pending, calling attention to *new* cases or legislation or *other intervening matter* not available at the time of his last filing." (Emphasis added)

[2] Petition 77-1501, pp. 36-9.

[3] Appendix I to Petition 77-1501, App. 5-6, and Petition 77-1501, p. 38, fn. 50.

as FOIA), 5 U. S.C. 552, seeking to determine if there had been compliance, or non-compliance, with those Guidelines. These written requests were served upon:

—The Attorney General

—The United States Attorney, Northern District of Illinois, Eastern Division

—The Chief Postal Inspector

—The Federal Bureau of Investigation, and

—The Internal Revenue Service,

all federal agencies subject to those Guidelines, and involved in the "electronic surveillances" here.

To date, there has been only either *partial compliance* or, *non-compliance* with these pertinent requests. Reproduced in the Appendix hereto, are a number of these *new* documents all being pertinent to the Questions now before this Court for Review. These new documents support the Reasons submitted in the Petitions in support of Review of those Questions.

This Supplemental Brief implements Reasons 3, 4 and 6 advanced on behalf of Review of Questions 3, 4 and 6 of Petition 77-1501. These new documents augment and further support the arguments for suppressing the tapes and arguments that the Government violated Petitioners' Constitutional Privileges and Rights.

In addition, this Supplemental Brief notes action by this Court taken after the Petition was filed.

However, a 1978 letter response from the Chief Postal Inspector discloses now, that the contents of that evidence locker, including tapes and transcripts, and "logs of events," were released by some undisclosed person, to Postal Inspector Charlton, on February 2nd, 1976. However, there is no mention as to the disposition thereof by Charlton, and thus Trail No. 3 as to Tape 101, ends with Charlton.

Tape 101 was thus, in three different places at the same time, by virtue of Trails Nos. 1, 2 and 3, and, Tape 102 was in two different places at the same time, by virtue of Trails Nos. 1 and 2.

The new documents do not aid the Record since they do not disclose any subsequent disposition of the tapes—none of the new documents created any link, any "chain of custody" linking the Original Tapes 101 and 102, to those "O" versions of tapes presented in Court in 1976, by federal trial attorneys.

The new documents however, raise pertinent unanswered questions raising further doubt as to the admissibility of the tapes presented in Court, as follows:

1. Were the *original* Tapes 101 and 102 placed in that Locker? Or were they copies?
2. Who made that deposit? D'Hooge or someone else?
3. Were Tapes 101 and 102 supplied to Attorney Winstein the "originals"? Or were they copies?
4. If copies of the *original* tapes were made, who made them and how was their integrity preserved?
5. To whom and when were *copies* of these tapes supplied?

6. Who had access to that locker?

7. Who exercised right of access to that locker between September 27, 1973 and February 2, 1976?

8. Who removed those tapes and when?

We submit that with this new evidence within this Supplement, the foundation for admission of the tapes has been eradicated, and that the Petitioners were convicted on the basis of impermissible and inadmissible proof.

F. There Was No "Prior Consent" to "Intercept".[11]

Petitioners argue in the Petition, that since there was no "aural acquisition" of the tapes, that there was no "interception" with "prior consent" within the statute granting the exemption to Fourth Amendment prohibitions.[12]

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[11] Subsidiary Reason F to Reason 3; Petition 77-1501, p. 3 and pp. 27-29.

[12] 18 U. S. C. 2511 (2) (c) provides that:

"(c) It shall not be unlawful under this chapter for a person acting under color of law to *intercept* a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given *prior consent* to such interception." (emphasis added)

That term "intercept" is statutorily defined at *18 U. S. C. 2510* (4) as:

"(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

To "intercept" as used in 18 U. S. C. 2511 (2) (c), means the "aural acquisition" of the "oral communication"—that is to actually hear it, to listen to the "intercepted" "oral communication" with the "prior consent" of one of the parties to that conversation.

The new documents confirm Petitioners' contentions that *in fact:*

—Although Tape 101 was made on September 27th, 1973, no one heard its contents, until an *unauthenticated copy* was heard on October 25th, 1973.[13]

—Although Tape 102 was made on October 15th, 1973, no one heard its contents, until an *unauthenticated copy* was heard on October 25th, 1973.[14]

Under the case law cited in the Petition, the tapes were inadmissible. Neither the Record nor the new documents reveal where in fact, the *original* Tapes 101 and 102 were, nor what truly happened to them. But, the new documents confirm that the conversations were not monitored as they were made, nor overheard by anyone other than the parties thereto, and the new documents confirm that Informant Pete Pappas did not give his consent for anyone to have "aural acquisition"—to listen to and hear the tapes, until October 17th, 1973, *after* the tapes were made. There was no "prior consent"—rather there was only *subsequent* consent, and the statute, 18 U. S. C. 2511(2)(c) mandates only "prior consent".[15]

REASON 4: The Tapes Were Inadmissible Because the Guidelines of the Attorney General Were Not Complied With.[16]

This same Question is being reviewed by this Court in *United States* v. *Caceres,* cert. pending, 76-1309, cert. to 545 F. 2d 1182 (9th Cir. Cal.).

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[13] Appendix M, App. 10.

[14] Appendix M, App. 11.

[15] Petition 77-1501, p. 29 citing: *United States* v. *Bynum,* 360 F. Supp. 400 (1973 DC NY), aff'd (CA NY) 485 F. 2d 490; *Smith* v. *Wunker,* (1972, D.C. Ohio), 356 F. Supp. 44.

[16] Petition 77-1501, p. 3, pp. 36-39.

Petitioners urge that the Guidelines promulgated by the Attorney General in 1972, and in effect in 1973 when the tapes were made, were not complied with.[17]

A: The Guidelines:

The Attorney General's Guidelines specify that the "head" of the investigation, U. S. Attorney Thompson in this instance, or his "delegate", Assistant U. S. Attorney Skinner in this instance, submit the written request to the Attorney General for advance written authorization to conduct any "electronic surveillances" including the taping of "consensual conversations". There is no provision in those Guidelines for any further "redelegation" by the U. S. Attorney or his delegate.[18]

B. Requests for Authorization to Tape.

The new documents reveal, or confirm, that:

1. Neither U. S. Attorney Thompson, nor his "delegate" Assistant U.S. Attorney Skinner, submitted any written requests to the Attorney General.[19]

2. The Internal Revenue Service not only did not submit a written request, but even denied making any "electronic surveillances" of the Petitioners in 1973.[20] Now, in 1978, the IRS urges that it did not make any "independent surveillance" and

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[17] Petition 77-1501, pp. 36-39.

[18] Appendix G to Petition 77-1501, App. 2.

[19] Skinner, in his 1976 testimony conceded that: ". . . I didn't make any written requests . . .". Trans. 473.

[20] Appendix P, App. 15-16, their 1975 Report to the Attorney General denying any "electronic surveillances."

concedes giving its "technical assistance" to the Postal Service.[21]

3. The Chief Postal Inspector admits that he submitted written requests to the Attorney General at the behest of U. S. Attorney Thompson and/or Assistant U. S. Attorney Skinner, as elaborated hereinafter.

C. Purported Compliance by the Chief Postal Inspector.

The new documents include Reports prepared and submitted by Postal Inspectors to the Chief Postal Inspectors. Their existence was never disclosed to the Petitioners, nor supplied as "Brady" material. These Reports are implemented by letters from the Chief Postal Inspector to the Attorney General.

It has been noted that the Chief Postal Inspector had been requested by the OFFICE of the U. S. Attorney, for the Northern District of Illinois, to institute "electronic surveillances" and that AUSA Skinner then drafted Marcel D'Hooge into the investigatory team he headed to aid in this project.[22]

We submit that there was no compliance with the Guidelines of the Attorney General, by the United States Attorney or his delegate, and that any action by the Chief Postal Inspector was not compliance either.

The Guidelines in providing that:

> "All Federal departments and agencies shall, except in exigent circumstances as discussed below, obtain the advance authorization of the Attorney General or any designated Assistant Attorney General before using

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[21] Appendix O, App. 14.

[22] Petition 77-1501, p. 15.

any mechanical or electronic device to overhear, transmit, or record private conversations other than telephone conversations without the consent of all the participants. Such authorization is required before employing any such device, whether it is carried by the cooperating participant or whether it is installed on premises under the control of the participant.

Requests for authorization to monitor private conversations shall be addressed to the Attorney General, in writing, by the head of the department or agency responsible for the investigation, or his delegate, . . .

Requests for authorization will receive prompt consideration by the Attorney General or his designee. To assure adequate time for considering a request and for notifying the requesting department or agency of the appropriate decision, it is important that each request be received by the Office of the Attorney General no less than 48 hours prior to the time of the intended monitoring. It should be clearly understood that the use of consensual devices will not be authorized retrospectively.

Where a request cannot be made in compliance with the 48-hour requirement, or in exigent circumstances precluding request for authorization in advance of the monitoring—such as the imminent loss of essential evidence or a threat to the immediate safety of an agent or informant—emergency monitoring may be instituted under the authorization of the head of the responsible department or agency or other agency official or officials designated by him. The Attorney General or his designee shall be notified promptly of any such monitoring and of the specific conditions that precluded obtaining advance approval, and shall be afforded the information enumerated above that would have been given in requesting advance approval."[23]

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[23] Appendix J to Petition 77-1501, App. 2-3.

specify procedures for:

—Advance written requests for specified persons;

—Formal authority from the Attorney General;

—Emergency authority in certain "exigent circumstances";

—Followup Report to the Attorney General of such "emergency" operations.

First—Was there proper, advance "emergency authorization" to make Tape 101? We submit that the documents prove otherwise, noting the following sequence of events:

As to Petitioner Pappas:

—At 2:04 P.M., September 26th, 1973, the Postal Inspector at Chicago telexed the Chief Postal Inspector at Washington, seeking "emergent authority" to ". . . monitor and record the conversation . . ." on September 27th, 1973, between informant Pete Pappas and Petitioner Peter V. Pappas. (Appendix R. App. 19-20).

—At 5:36 P.M., September 26th, 1973, the Chief Postal Inspector telexed *his* grant of "emergent authority" for the making of what became Tape 101. (Appendix S, App. 21).

As to Petitioner Craig:

—At 3:23 P.M., September 27th, 1973, *after* Tape 101 was made, the Postal Inspector at Chicago telexed the Chief Postal Inspector at Washington, D. C., seeking to enlarge his "emergent authority" to include petitioner Craig, and to further extend it until October 26th, 1973. (Appendix T, App. 22-23).

Here, there was no "imminent loss of essential evidence". There was no "threat to the immediate safety" of informant Pete Pappas. Thus, the "exigent circumstances"

which the Guidelines require to justify the "emergency authorization", do not exist. As to Petitioner Craig, moreover, it was *retrospective*, and prohibited by the Guidelines.

Since this investigation commenced in January, 1973 and the Grand Jury commenced its inquiries on April 1st, 1973, any purported "emergency" here, was "government-created" and not an "exigent circumstance" as specified in the Guidelines.

Thus, this "emergent authorization" granted by the Chief Postal Inspector was null and void, and Tape 101 should have been and should now be ordered suppressed. *United States* v. *Caceres*, cert. pending, 76-1309 to 545 F.2d 1182 (1976), (9th Cir.). If these true facts had been available to the Trial Court instead of withheld, this Tape would have been suppressed at that time.

Secondly, was there proper formal, advance written authorization granted by the Attorney General? We submit that the new documents prove otherwise, noting the following sequence of events:

As to Petitioner Pappas:

—On September 27th, 1973, then AAG Henry Petersen approved the formal written request of that date submitted by the Chief Postal Inspector, for the taping of the September 27th, 1973 conversation between informant Pete Pappas and Petitioner Peter V. Pappas. *The time was not noted thereon.* (Appendix U, App. 24).

—At 5:23 P.M., September 27, 1973, the Chief Postal Inspector at Washington, telexed the Postal Inspector at Chicago, notice of the said AAG approval

—over five (5) hours *after* Tape 101 was made. (Appendix V, App. 26).

As to Petitioner Craig:

—At 5:10 P.M., October 1st, 1973, an AAG, "Maroney",[24] approved the formal written request of that date submitted by the Chief Postal Inspector, seeking enlargement to add Petitioner Craig and to extend until October 26th, 1973.

Since Tape 101 was made at *noon* of September 27th, 1973, the formal approval was obviously *not* in advance, since the Chief Postal Inspector did not telex receipt of the formal approval until hours later, at 5:23 P.M. Moreover, that late Telex covered only Petitioner Peter V. Pappas, and it was not until October 1st, 1973, that Petitioner Craig was covered by the grant of authority.

The Guidelines specifically negate the validity of this *late* formal approval with:

> "It should be clearly understood that the use of consensual devices will not be authorized retrospectively".[25]

Conclusion:

Petitioners submit that:

—No *proper* advance written request for authorization to monitor and tape was made, since neither the "head" of the investigation nor his "delegate"—Messrs Thompson or Skinner—submitted a request.

—The Guidelines do not provide for "re-delegation" of the responsibilities and duties of that "head" of the in-

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[24] Apparently AAG Petersen was not in Washington, D. C. that day.

[25] Appendix GG, App. 3, Petition 77-1501.

vestigation. Thus, the purported requests submitted by the Chief Postal Inspector did not comply with the Guidelines.

—There was no compliance by the Internal Revenue Service, since the active participation of an IRS agent was not included within the Postal Inspector's documentation; nor did the Internal Revenue Service even comply with its own Regulations.

—There was no basis for any "emergent authorization" as was granted here.

We submit that Tapes 101 and 102 should thus have been suppressed, and the Trial Court would have suppressed them if this newly disclosed evidence had been disclosed to the Trial Court during its hearings on the Motions to Suppress the Tapes.

REASON 6: The Government's Conduct Was an Abuse of the Constitutional Privileges of the Petitioners.

Petitioner Walker's Petition, 77-1500 pp. 17-18 presented the basic argument that, here, there was an abuse and violation of Due Process under the Fifth Amendment, and of the Right to Counsel under the Sixth Amendment. Petitioner Pappas augmented the Sixth Amendment argument, and Petitioners Craig and Pappas adopted the Walker Petition.

Supplementing Walker's *Due Process* point, the *withholding* of the newly disclosed documents from the Petitioners, by the Government Attorneys during the court of the trial below, was not only a direct violation of the canons governing the professional conduct of federal pros-

ecutors,[26] but was an abuse of *due process,* if not also an obstruction of justice by Government attorneys.[27] We elaborate as follows:

The Undisclosed Reports:

A review of the newly disclosed 1973 Reports by Postal Inspectors reveals that if they had been available to the petitioners during the Trial, the Reports would have re-

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[26] American Bar Association's "Code of Professional Responsibility and Code of Judicial Conduct", adopted August 12, 1969, as amended, provides as follows:

> "EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: *the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.* Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."

and

> "EC 7-27 Because it interferes with the proper administration of justice, *a lawyer should not suppress evidence* that he or his client has legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein." (Emphasis added)

[27] Reply Brief of Petitioners, pp. 17-19.

butted the Government's Evidence and Arguments, particularly as to the admissibility of the tapes.

We have noted that USA Skinner testified in 1976 during cross-examination, as follows:

> "Oh, I recall that the postal inspectors *told* me *afterwards* that they had to submit reports to Washington . . ."; and
>
> "So, I *think* they did submit reports and as far as I know, they still exist."[28]

Skinner thus clearly stated that the Reports went directly to Washington—to the Postal Service; and he clearly implied that he, Skinner, had not seen those Reports and did not himself have them.[29]

Assistant U. S. Attorney James Holderman, who was one of the federal prosecutors below, in response to the 1978 FOIA demand, culled from the Trial files of his Office, copies of the various reports reproduced here.[30]

Thus, the Postal Inspectors did not merely *tell* United States Attorney Skinner that they had to file Reports with their superiors in Washington, D.C. They supplied copies of those Reports to Skinner, and they were in his trial files in 1976, during the trial below. Skinner's testimony obviously represented and implied the contrary.

These Reports were essential to the Defendants, and should have been released, if not as "Brady" material, then pursuant to the Trial Court Orders for pre-trial dis-

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[28] Tr. 473, Hearings on Motions to Suppress.

[29] Petition 77-1501, pp. 37-38.

[30] Copies of Reports in the U. S. Attorney's files reproduced in the Appendix include: Appendices J, K, L, M, R, T, U and V.

covery. They would have been effectively been used as follows:

A. The Report of August 31st, 1973[31] would have refuted the Government's evidence and accusations that Petitioner Pappas had sought to improperly influence others as to the testimony they were to give to the Grand Jury and that he had sought to obstruct justice. Postal Inspector Kell reports, as to his conversations with James McBride, that:

> ". . . Mr. McBride was then interviewed and revealed that Pappas made no attempts to influence or obstruct him from testifying truthfully. The recorder was not placed on McBride's telephone and no telephone conversations were intercepted."[32]

Thus, Petitioner Pappas was deprived of the opportunity to rebut the Government's evidence and accusations.

B. The Report of October 25th, 1973 would have attacked the authenticity and credibility of Tape 101.[33]

The evidence presented upon the Trial by the Government was to the effect that once Marcel D'Hooge activated the recording device he placed upon the body of Informant Pete Pappas just before noon of September 27th, 1973, it was "live", it had "ears" and recorded all sounds heard by Informant Pete Pappas, until almost an hour later, when D'Hooge deactivated and removed the device and the reel of tape.[34]

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[31] Appendix J, App. 1.

[32] Appendix J, App. 2-3.

[33] Appendix M, App. 10.

[34] Petition 77-1501, p. 17.

Postal Inspectors Kell and Greenan, in their Joint Report of October 25th, 1973,[35] reveal that they have heard for the first time, an unauthenticated *copy* of Tape 101, and they relate that on that date they heard specific words and statements they attribute to Petitioners Pappas and Craig.

As to Petitioner Pappas, they relate that:

> ". . . Peter V. Pappas discussed his possible actions; that he could deny receiving the money reportedly paid to him, or he could take the blame for the whole thing. . . ."

These words attributed to Petitioner Pappas are not found on the "O" version of Tape 101 presented in Court.

As to Petitioner Craig, they relate that:

> ". . . then Peter V. Pappas left. Then Robert Craig said he had heard Peter V. Pappas was going to plead guilty and tell about the ready-mix industry fund. Mr. Craig said Peter V. Pappas had denied this to him prior to Pete Pappas joining the two. Robert Craig discussed with Pete Pappas, that he, Pete Pappas, should talk to Walter Hoffelder to tell him they were aware he was going to sign a note for a $25,000 defense fund for Peter V. Pappas, and to assure him the four concerned legislators would come up with $5,000 each. . . ."[36]

These words attributed to Petitioner Craig are not found on the "O" version of Tape 101 presented in Court.

Recalling that the "O" version of Tapes 101 and 102 were represented as "raw" copies, that a "cleansed" version, the "1" version was prepared by the Government to enhance the audibility of the "O" series, and that the "3"

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[35] Appendix M, App. 10-11.

[36] Appendix M, App. 11.

series was the excised version of the "1" series, excised pursuant to Bruton,[37] it is apparent that those words heard by the Postal Inspectors were not on any tape presented by the Government in Court.

It must be presumed that since Postal Inspectors Kell and Greenan signed that Report and submitted it to their superiors, they truthfully related what they themselves had heard on the tapes in their temporary possession. However, since what they heard is not on any of the tapes presented in Court, there is a sharp and pertinent discrepancy between the tape heard by the Postal Inspectors and the tape played in Court. Thus, the tapes presented in Court were not accurate. They were not authentic and tampered with. Presumably, those words heard by Kell and Greenan have been deleted from the tapes presented in Court.

Petitioners Pappas and Craig, deprived of this Report, were denied and precluded from the opportunity to present it in open Court to refute the authenticity and the credibility of the tapes presented by the Government to the Court and to the Jury. The absence of those words attributed to Petitioners Pappas and Craig certainly reflected adversely upon the authenticity of the version of Tape 101 presented in Court, and tended to prove tampering with the evidence.

C. The Report of October 18th, 1973 would have attacked the authenticity and credibility of Tape 102.[38]

The Government, during the course of the trial, represented that only one tape was made on October 15th, 1973,

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[37] *Bruton* v. *United States*, 391 U.S. 123 (1968). Petition 77-1501, pp. 16-17 detailing this procedure.

[38] Appendix L, App. 7.

what became the "O" version of Tape 102—the tape made by Informant Pete Pappas using the body recorder and reel of tape installed upon him by IRS agent D'Hooge.[39]

This Report now reveals for the first time, the use of a radio transmitter simultaneously with the body recorder, and the making of two additional and undisclosed tapes.

A second tape was intercepted and received on a recorder in Room 300 of the nearby Lincoln Hotel just one block from the Mansion View Motel.

A third tape was intercepted and received on a recorder in a governmental passenger car parked nearby.

The Report further confirms that none of the three tapes made that day were listened to at that time and that the conversations were not monitored.

This Report raises obvious questions. Which of the three tapes was presented to the Court. Was the "O" version of Tape 102 presented in Court a *copy* of one of those three tapes? Or, was it a composite of two of them, or of three of them? Why did the Government fail to disclose the existence of the radio transmitter and of the two additional tapings? Where are these three tapes and was their integrity assured in any way?

Petitioners were denied the opportunity and precluded from attacking the authenticity of the "O" version of Tape 102 and to seek to determine whether or not it had or had not been tampered with.

We submit, that this nondisclosure, this deliberate withholding of pertinent evidence, denied Petitioners of Due

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[39] Petition 77-1501, p. 15.

Process, to such an extent, that only reversal can effectively cure this abuse and violation of the Petitioners' Constitutional Privileges.

II.

REASON 5. This Court Should Now Exercise Its Discretionary Judicial Power of Supervision of Federal Criminal Justice, to Reverse the Trial Court's Action in Consolidating the Mail Fraud Indictment (74 CR 879) with a Perjury Indictment (75 CR 202).

This Supplements Reason 5 supporting review of Question 5.[40]

Attention has been called to *Jacobs,* and this Court is already aware of its Per Curiam opinion of May 1st, 1978 that "The writ of certiorari is dismissed as improvidently granted.".[41]

Thus, the ruling of the Second Circuit stands—that federal courts on appeal, have power to reverse convictions which they find to be erroneous. The Second Circuit had ordered suppression of Jacobs' testimony given before the Grand Jury, at her subsequent perjury trial.

The Seventh Circuit here is in conflict with that Second Circuit ruling, and here, the testimony given by Course before the Grand Jury should be suppressed, and in addition, the consolidation of the Mail Fraud Indictment with the Perjury Indictment was in error and this Court should now thus reverse.

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[40] Petition 77-1501, pp. 3-4, 39-42.

[41] Petition 77-1501, noting that *United States* v. *Jacobs,* cert. granted 77-1513, was pending at the time this Petition was granted, and that *Jacobs* was virtually on all fours with this case. At p. 39.

CONCLUSION

Wherefore, for the Reasons Stated in the Petitions, in their Reply Brief and now in this Supplemental Brief, the Petitioners respectfully pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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